

APPROVED

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Federal Trade Commission

Boston Regional Office

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786-46-51

June 10, 1986

The Honorable John C. McNeil, Chairman
Committee on Health Care
House of Representatives
Room 130
State House
Boston, MA 02133

ATTN: Ms. Ronna Bernstein

RE: Senate Bill 1732

Dear Mr. Chairman:

We are pleased to respond to your April 24, 1986, request that we comment on Senate Bill 1732 and hope that our remarks will be of assistance.¹ Although we recognize the need to prohibit deceptive advertising practices by dentists and dental hygienists, it is our belief that a number of provisions in the proposed legislation would restrain truthful communication and thereby unreasonably inhibit competition and injure consumers.

Your request for comments was limited to S. 1732, which would amend existing statutory provisions governing dentistry.

¹ These comments represent the views of the Boston Regional Office and the Bureau of Consumer Protection, Economics, and Competition of the Federal Trade Commission. Views expressed are not necessarily those of the Federal Trade Commission or of any individual Commissioner. The Commission has, however, reviewed these comments and has voted to authorize their submission.

Our comments are thus limited to that subject. However, we note that the existing statute, Mass. Gen. Laws Ann. ch. 112, §52A, contains additional restrictions on advertising by dentists. These restrictions, like the ones discussed below, raise serious concerns of competitive and consumer injury. We would encourage an examination of the existing statute and would be happy to work further with your committee or others on this matter.

The Federal Trade Commission is empowered under 15 U.S.C. §41 et seq., to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. Pursuant to its statutory mandate, the Commission has attempted to encourage competition among members of licensed professions to the maximum extent compatible with other legitimate state and federal goals. For several years, the Commission has been investigating the competitive effects of restrictions on the advertising and business practices of state-licensed professionals, including dentists, optometrists, lawyers, physicians, and others. The Commission's goal is to identify and seek the removal of those restrictions that impede competition, increase costs, and harm consumers without providing countervailing benefits.

As a part of the Commission's effort to foster competition among licensed professionals, it has examined the effects of public and private restrictions that limit the ability of professionals to engage in truthful and nondeceptive advertising.² In this regard, studies have shown that prices for professional goods and services are lower where advertising

² See, e.g., American Medical Association, 94 F.T.C. 701 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982). The AMA decision -- which held "that broad bans on advertising and soliciting are inconsistent with the nation's public policy" (94 F.T.C. at 1011) -- follows the reasoning of recent Supreme Court decisions involving professional regulation. See, e.g., Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 105 U.S. 559 (1985) (holding that an attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information regarding the legal rights of potential clients or for using nondeceptive illustrations or pictures); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (holding a state supreme court prohibition on advertising invalid under the First Amendment and according great importance to the role of advertising in the efficient functioning of the market for professional services); and Virginia State Board of Pharmacy v. Virginia Citizens Council, 425 U.S. 748 (1976) (holding a Virginia prohibition on advertising by pharmacists invalid).

exists than where it is restricted or prohibited.³ Studies have also provided evidence that restrictions on advertising raise prices but do not increase the quality of services available.⁴ Furthermore, truthful advertising benefits consumers by reducing search costs and enabling consumers to make more informed decisions. Therefore, to the extent that truthful and nondeceptive advertising is restricted, higher prices and a decrease in consumer welfare are likely to result. The Commission has also examined various justifications that have been offered for restrictions on advertising and has concluded, as the courts have, that, by and large, these proffered reasons do not justify restrictions on truthful advertising. For these reasons, only false or deceptive advertising should be prohibited.

We believe that a simple prohibition against false or deceptive advertising is the best means of protecting both consumers and the competitive process. Any more restrictive standard is likely to suppress the dissemination of potentially useful information and may contribute to an increase in prices.

I. Disadvantages and Costs of the Proposed Legislation

It is desirable for consumers to have as much truthful information as possible about the price, quality and other attributes of goods and services. The proposed legislation could reduce the availability of such information and thus lessen the opportunity for informed decision making and increase consumer search costs.

A. Prohibitions on Communication of Nonprice Information

³ Bureau of Economics and Cleveland Regional Office, Federal Trade Commission, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984); Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Benham and Benham, Regulating Through the Professions: A Perspective on Information Control, 18 J.L. & Econ. 421 (1975); Benham, The Effects of Advertising on the Price of Eyeglasses, 15 J.L. & Econ. 337 (1972).

⁴ Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Cady, Restricted Advertising and Competition: The Case of Retail Drugs (1976); McChesney and Muris, The Effects of Advertising on the Quality of Legal Services, 65 A.B.A.J. 1503 (1979); Muris and McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, 1979 Am. B. Found. Research J. 179 (1979).

A number of sections of the proposed legislation would appear to prohibit communication of important nonprice information that could aid consumers in selecting a dentist or dental hygienist. As such, they could unreasonably inhibit competition and injure consumers.

First, Section (1) would prohibit advertisements by dentists or dental hygienists that "contain a statement of opinion as to the quality of dental services." A ban such as this on claims about quality is likely to be injurious to competition and consumers. Virtually all statements about a seller's performance, experience, or qualifications could be interpreted as implying statements of opinion as to quality. A ban on such claims would make it difficult for a seller to provide consumers truthful information about differences between his or her services and those of his or her competitors. When sellers cannot compare the quality and related attributes of their services to those of their competitors, the incentive to compete on those attributes is likely to be reduced, to the detriment of consumers.⁵

Second, Section (3) would prohibit advertisements that "refer to benefits or other attributes of dental procedures or products that involve significant risks but that do not include realistic assessments of the safety and efficacy of those procedures or products." We recognize that disclosures of safety and efficacy information may be necessary in some circumstances to prevent deception or health fraud. Those circumstances, however, should be determined on a case-by-case basis. This provision may be overly broad and may prevent or chill the communication to consumers of valuable information about new and innovative dental procedures and practices. It is possible that information concerning assessments of safety and efficacy could be communicated in other ways that would not prohibit or chill nondeceptive advertising. For example, disclosures to individual patients, by phone or in person, would provide the pertinent information to patients in a setting where any questions could be answered directly.

Third, Section (4) would ban advertisements that "contain statistical data, representations or other information that is not susceptible to reasonable verification by the public." The intent of this ban is unclear and, depending on its interpretation, it could have significant anticompetitive effects. If the intent is to require dentists to have

⁵ We have not commented on Section (2) because, although restrictive, it is not aimed at deception but at controlling appeals to anxiety.

substantiation for advertising claims, this would be consistent with Federal Trade Commission deception case law,⁶ and would not be objectionable. However, the language could be construed much more broadly to require not only that the advertiser have a reasonable basis for advertising claims, but also that the substantiation material be available to and understandable by the general public. This would significantly restrict useful nondeceptive advertising. If a substantiation requirement is desired, a simple requirement that a dentist have a reasonable basis for advertising claims would be preferable to the proposed language.

Fourth, Section (7) requires the "truthful disclosure of the source and authorship of any message published under a dentist's byline." This requirement appears to be aimed at "ghostwritten" informational columns, which, like most advertisements, are not written by the advertiser. If such an advertisement's contents are accurate and it is not deceptively presented as something other than an advertisement, no deception or other harm to consumers will result. Therefore, we believe that special restrictions aimed at "ghostwritten" advertising are unnecessary.

B. Prohibitions on Communication of Price Information

Two sections of the proposed legislation appear to place unnecessarily broad prohibitions or restrictions on the communication of price information. As the Supreme Court noted in Bates v. State Bar of Arizona, the lack of price information "serves to increase the [consumer's] difficulty of discovering the lowest cost seller of acceptable ability. As a result . . . [professionals] are isolated from competition and the incentive to price competitively is reduced."⁷ The absence of such information "serve[s] to perpetuate the market position of established professionals."⁸

First, Section (5) would ban advertisements that refer to "a fee or fees for dental services and fail to disclose that additional fees may be involved in individual cases." The intent of this language is unclear, and it could be interpreted in such a way as to chill truthful advertising. For example, it could be read to require that an advertisement that states a fee for a routine dental examination would violate the statute if it did

⁶ See, e.g., National Commission on Egg Nutrition, 88 F.T.C. 89 (1976), aff'd, 570 F.2d 157 (7th Cir. 1977), cert. denied, 439 U.S. 821, reissued, 92 F.T.C. 848 (1978).

⁷ 433 U.S. at 377.

⁸ 433 U.S. at 378.

not disclose that additional fees would be charged for the filling of a cavity found during the examination. We recommend that the above language be clarified to prohibit only deceptive advertising claims.

Second, Section (6) would prohibit dentists and dental hygienists from "offering a discount for dental services without disclosing the total fee from which the discount will apply." This section would apparently require dentists to disclose the regular price of each type of service to which an advertised discount would be applicable. Such a requirement would effectively preclude the advertising of across-the-board discounts (e.g., "ten percent off all dental services") for general promotional purposes or for specific groups such as senior citizens or students. Since it would often be impractical to state in an advertisement the regular prices of all of the services covered by such an offer, this section would be likely to suppress certain forms of truthful and valuable advertising, and it would make other forms of nondeceptive advertising more costly.⁹

II. Conclusion

As a general matter, the proposed legislation affecting advertising should be directed only at specific forms of promotion that are "inherently likely to deceive or [as to which] the record indicates that a particular form or method of advertising has in fact been deceptive."¹⁰ Measured by this standard, the sections of the legislation discussed above appear to be overly restrictive of truthful communications. Because the sections are likely to have an adverse effect on competition and on consumer welfare, we believe they should be eliminated or modified in favor of provisions that are focused narrowly on deceptive advertising practices. As we noted earlier, it is the staff's position that a prohibition of false or deceptive advertising is sufficient to protect consumers.

⁹ Such a requirement may violate the First Amendment. See, e.g., South Ogden CVS Store, Inc. v. Ambach, 493 F. Supp. 374 (S.D.N.Y. 1980).

¹⁰ In re R.M.J., 455 U.S. 191, 202 (1982).

We thank you for your willingness to consider our comments. We would be happy to supply copies of the studies - referred to above or to provide any other assistance you desire.

Sincerely,

A handwritten signature in cursive script that reads "Phoebe Morse". The signature is written in dark ink and is positioned above the typed name.

Phoebe D. Morse
Regional Director
Boston Regional Office